IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9295 OF 2005

Jayems Engineering Company .... Petitioner

versus

T.P. Parsani ... Respondent.

Ms. Ranjana Parikh for the petitioner.
Shri Sankar Marathe for the respondent.

CORAM; P.V. KAKADE, J.

DATED; FEBRUARY 22, 2006.

P.C:

1. Heard the learned counsel for the Petitioner and the learned advocate for the respondent. Perused the record.

2. This petition is preferred against the order passed by the lower appellate court dated 29-9-2005 allowing the review petition and setting aside the order passed by the trial court dated 29-6-2005 dismissing the Notice No.631/04. The petitioner/plaintiff in pending Suit No.72/98/80 prayed for order of striking of evidence in affidavit of defendant which was not pleaded in written statement. Plaintiff also prayed

for alternate order to the effect that the court shall not consider the unpleaded evidence in affidavit of defendant 1(a).

3. In the said eviction suit defendant no.1 has filed affidavit for examination-in-chief. On pages 1 and 2 of the said affidavit defendant no.1(a) has narrated certain facts which according to the petitioner/plaintiff are not part of the pleadings and therefore the contends of the affidavit are not consistent with the pleadings but are contrary to the pleadings.

4. The application was heard on merits and after hearing both the parties the trial court was of the view that notice moved by the plaintiff deserves to be made absolute and it was directed that unpleaded evidence of defendant no.1 is to be simply ignored at the time of judgment in the suit. Against the said order, revision was taken up. The revisional court after hearing both the parties, came to the conclusion that the revision was required to be allowed and consequently the trial court order was set aside and notice was dismissed. The view taken by the revisional court was to the effect that the trial court should have decided the relevancy of those facts involved within the purview of section 5 to 55 of the Evidence

Act. It was further observed by the revisional court that if at all the trial court comes to the conclusion after recording the entire evidence that, that part of evidence is not hekpful for proving the case, then the court should pass necessary order, but simply because it was not helpful that part of evidence, cannot be struck down at the stage before the trial commence.

5. In my considered view, in view of the facts and circumstances the view taken by both the courts below appears to be partly incorrect, in the sense that the trial court was not justified at all in disposing of the notice only with a direction that the relevant part of the evidence which was allegedly inconsistant with the pleadings should be ignored. Similarly it was not correct on the part of the revisional court to make sweeping remark to the effect that the lower court should decide the relevancy of the relevant facts within the purview of section 5 to 55 of the Evidence Act.

6. In this regad, it must be noted that the stage of the trial when the notice was moved was of the filing of the affidavit of evidence and no cross examination had yet commenced and therefore it cannot be said that by introduction of the relevant facts in the affidavit, any prejudice was caused to the present petitioner. In

other words, it was still open for the present petitioner to cross examine the defendant on the basis of facts which were sought to be introduced in order to show that those were besides the pleadings. The trial court in fact would be in a position to decide the relevancy of the evidence on record when the cross examination is in progress and could very well issue relevant direction in that regard. In that context the observations made by the revisional court that the trial court was not correct to issue direction toto striling down of the evidence at the stage before the cross examination was commenced, appears to be incorrect.

7. Under the circumstances it is directed that the trial court is at liberty to proceed with the recording of evidence and if it comes to the conclusion that particular part of the evidence which would be led by the concenred party is besides the pleadings or in contradictions with the pleadings then in that regard such part of the evidence could be excluded from consideration. However, the direction to ignore particular facts impleaded in the affidavit at this stage would not be just and proper. With these observations the petition stands partly allowed and disposed of with direction to the trial court to proceed with the recording of the evidence and come to

a particular conclusion whether to discard any part of the evidence while recording the evidence including the cross examination on particular aspects. Petition stands disposed of with no order as to costs.

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